

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-678

EXECUTIVE JET AVIATION, INC.,
ET AL., PETITIONERS

v.

CITY OF CLEVELAND, OHIO, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT HOWARD E. DICKEN
IN OPPOSITION

This action arises out of the crash of petitioners' aircraft during take-off from a runway at Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie (R. 18).¹ After receiving clearance for take-off and a warning that numerous seagulls were on the runway, the aircraft executed its take-off and became airborne about midway down the runway (R. 18-19, 70-72, Ph. 2). The take-off flushed the seagulls on the runway

¹ "R." references are to the Appendix, and "Ph." references are to the Appendix of Photographic Exhibits, both of which were filed in the court of appeals and transmitted to this Court.

and they rose into the airspace above the runway and directly in front of the approaching airborne aircraft (App. 19, 70-72). The aircraft, by this time flying approximately 100 feet above the runway, collided with a large number of seagulls, many hitting its engine intakes and belly (App. 19, 59-60, 70-72).

As a result of the impact, there was an almost immediate total loss of the aircraft's power and a substantial reduction in its air speed (App. 19). Settling back down to the runway, the aircraft veered slightly to the left, struck a portion of the airport perimeter fence and the top of a pickup truck parked adjacent to the fence, and came to rest in Lake Erie, a short distance off shore (App. 19, 39-53, 70-72). While there were no injuries to the crew, (App. 20) the aircraft sank and became a total loss.

Invoking admiralty jurisdiction, petitioners brought this action, against the City of Cleveland, Ohio, as the owner and operator of Burke Lakefront Airport, Philip A. Schwenz, the airport manager, and Howard E. Dicken, a Federal Aviation Administration (FAA) air traffic controller on duty at the airport at the time of the crash, for the value of its aircraft (App. 3-4). The district court held that the case was not cognizable in admiralty and dismissed the complaint for lack of jurisdiction over the subject matter (Pet. App. 27a-42a). A divided court of appeals affirmed on the ground that "the alleged tort . . . occurred on land before the aircraft reached Lake Erie" (Pet. App. 6a).

1. It has long been established that only torts occurring on navigable waters are within admiralty jurisdiction. *Victory Carriers, Inc. v. Law* (No. 70-54, October

Term 1971), 40 U.S.L.W. 4059, 4060-61. This Court has held that the locus of the tort is where the allegedly negligent act occurred and took effect, and not where the injuries or damages are sustained. If "[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land", then admiralty has no jurisdiction. *Smith & Son v. Taylor*, 276 U.S. 179, 182. See, also, *Minnie v. Port Huron Co.*, 295 U.S. 647, 649; *The Admiral Peoples*, 295 U.S. 649.

Both courts below correctly held that admiralty jurisdiction does not lie here because the allegedly tortious conduct—the failure of the federal air traffic controller to warn petitioners' aircraft of the seagulls on the runway and the failure of the City of Cleveland and its airport manager to remove those seagulls from the runway—and the consummation of the alleged tort—the resultant collision of petitioners' aircraft with the seagulls—occurred on land over the runway. Further review of this factual determination is not warranted.*

2. Contrary to petitioners' assertion (Pet. 10-16), the decision below is not inconsistent with *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (C.A. 3), certiorari denied, 375 U.S. 940. The decision in that case, sustaining admiralty jurisdiction over the crash of an aircraft into the navigable waters of Boston Harbor, was rendered on a motion to dismiss the complaint, and there is nothing in either the district court's opinion

* Petitioners have also filed an action against the United States under the Federal Tort Claims Act, *Executive Jet Aviation, Inc. and Executive Jet Sales, Inc. v. United States* (N.D. Ohio, E. Div., Civ. No. C69-352), which has been held in abeyance pending the outcome of the instant case.

on the motion to dismiss (203 F.Supp. 430) or the opinion of the court of appeals to indicate that the facts before the court showed whether the aircraft first became inoperative over land or sea.³ Here, by contrast, the facts alleged by the petitioners show that the alleged tort occurred over land.⁴

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

January 1972.

³ To support their assertion, petitioners rely upon *Scott v. Eastern Air Lines, Inc.*, 339 F.2d 14 (C.A. 3), certiorari denied, 393 U.S. 979. In that case, the evidence at trial showed that birds had struck the aircraft over land before its crash into the harbor (see the district court opinion rendered after trial, *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673, 675 (E.D. Pa.)).

⁴ Since the instant case turns on undisputed facts showing that the alleged tort had its impact upon petitioners' aircraft over land, there was no need for the court below to reach the question of whether, in addition to a maritime location, there must be a maritime nexus to support admiralty jurisdiction.